

IN THE INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI B.R. BASKARAN, ACCOUNTANT MEMBER

ITA No.733/Bang/2013
Assessment year : 2009-10

M/s. Golden Gate Properties Ltd., # 820, Golden House, 80 Feet Road, Koramangala 8 <sup>th</sup> Block, Bangalore – 560 095. <b>PAN: AAACG 5248H</b>	Vs.	The Deputy Commissioner of Income Tax, Circle 11(3), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Narendra Sharma, Advocate
Respondent by	:	Dr. Shankar Prasad, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	10.06.2019
Date of Pronouncement	:	14.06.2019

**ORDER**

*Per N V Vasudevan, Vice President*

This is an appeal by the assessee against the order dated 18.01.2013 of the CIT(Appeals)-I, Bangalore relating to assessment year 2009-10.

2. There are two issues that arise for consideration in this appeal. The first issue is with regard to the disallowance made by the AO while computing total income of the assessee of a deduction of Rs.4,62,53,175 claimed by the assessee being loss incurred on assignment of advances. The second issues that arises for consideration is with regard to the addition of a sum of Rs.14,50,66,953 to the profit as per the Profit & Loss

(P&L) account on account of provision for bad and doubtful advances while computing book profits u/s. 115JB of the Income-Tax Act, 1961 [“the Act”].

3. As far as the first issue referred to above is concerned, the assessee has filed an application seeking to raise the following additional grounds of appeal:-

“Without prejudice the addition made under normal provisions of Rs. 4,62,53,175/- on account of disallowance of loss on assignment enhances the profits of the appellant and consequently on the enhanced income the appellant is entitled for deduction under section 80-IB of the Act as per the Circular issued by the Central Board of Direct Taxes in Circular No. 37/2016, dated 02/11/2016.”

4. The additional ground of appeal being purely a question which can be decided on the basis of legal provisions and on facts already available on record, the same is admitted for adjudication keeping in mind the decision of the Hon’ble Supreme Court in the case of *NTPC Ltd. 229 ITR 383 (SC)*.

5. The facts with regard to the first issue and the additional ground of appeal raised by the assessee are that the assessee is a company engaged in the business of construction of apartments and dealing in real estate. The assessee filed a return of income declaring total income of Rs.5,24,148. In arriving at the aforesaid total income, the assessee had deducted a sum of Rs.4,62,53,175 being loss incurred on account of assignment of advances. According to assessee, in the course of its business it made advances to secure contracts in connection with its business of construction and commercial and residential complexes and those advances were not made with a view to derive income in the form of dividend and interest. The assessee after realizing that the probability of securing contracts from the aforesaid companies is unlikely, transferred the

advances by way of assignment to one, M/s. Aishwarya Finance Ltd. Hyderabad at a discount of 75%. The details of the advances made by the assessee which were assigned at a discount of 75% were as follows:-

<b>Sl.No</b>	<b>Name</b>	<b>Amount (Rs.)</b>
1	Vivek Fiscal Pvt. Ltd.	1,85,90,000
2	Utsav Commercial Pvt. Ltd.	1,40,75,000
3	Doomsain Commercial Pvt. Ltd.	38,50,000
4	Skyline Suppliers Pvt. Ltd.	35,00,000
5	Amigo Commercial Pvt. Ltd.	30,00,000
6	Hanurang Projects Pvt. Ltd.	30,00,000
7	Mangalmayee Garments Pvt. Ltd.	27,00,000
8	BhairavTradelink Limited	20,00,000
9	Ospray Commercial Pvt. Ltd.	20,00,000
10	ViswajyotiTracon Pvt. Ltd.	20,00,000
11	Cube Fintex Pvt. Ltd.	19,00,000
12	CSK Realtors Ltd	15,00,000
13	Casecade Dealcom Pvt. Ltd.	10,00,000
14	Jeet Vanijya Limited	10,00,000
15	Apsara Trex Pvt. Ltd.	7,00,000
16	K Sera Productions Ltd.	5,05,900
17	Shiv Trading Company	3,50,000
	<b>Total</b>	<b>6,16,70,900</b>

6. On assignment of advances at a discount, the assessee incurred a loss of Rs.4,62,53,175 which was claimed as a deduction in the P&L account. The AO, however, refused to allow the claim of deduction made by the assessee for the reason that primarily the assessee had paid money to various companies for allotment of shares out of its, own share application money. The receipt in the nature of share application money is

a capital receipt. When the shares were not allotted by the various companies, and a part of the money was received by the assessee it was nothing but share application money in the nature of capital receipt and is not earned as income from its day to day business affairs. Therefore, the loss incurred by the assessee was in the nature of bad debt but was not in the nature of revenue expenditure and cannot be regarded as incurred wholly and exclusively for the purpose of business and hence not allowable. Accordingly the loss incurred of Rs.4,62,53,175/- on assignment of advance was disallowed by the AO treating the same as capital in nature.

7. The assessee had before the AO justified its claim for deduction by relying upon Note 7 of Schedule 18 of the financial statement wherein the description of advances to the third parties were as follows:-

“The company in previous years had paid share application money to various companies however no shares were issued to the company till the end of the previous year. During the year the company has sold / assigned the rights of these investment to Aishwarya Finance Limited, a related party, at a loss of Rs. 4,62,53,175/-”

8. It is on the basis of the aforesaid reply given by the assessee that the AO came to the conclusion that the loss in question was a capital loss and was not incidental to the business of assessee.

9. On appeal by the assessee, the CIT(Appeals) confirmed the order of AO. The following were the observations of the CIT(Appeals):-

“3.3. I have gone through the submissions of the appellant and examined the reasons given by the A.O in the assessment order. It is an undisputed fact that the appellant invested by way of the subscription of shares in various companies. It is also seen that the investment was made out of the share application received by it. As the investment was not yielding any good returns, the

appellant company wanted to assign these right to collect the money/ right to subscribe the shares to M/s Aishwarya Finance Ltd. Hyderabad at 75% discount. Accordingly the appellant realized Rs. 1,54,17,725/- and incurred a loss of Rs. 4,62,53,175/- It is the contention of the appellant that the loss was incurred in the course of its business and for the extension of its business and eligible for deduction u/s 37 of the Act. The appellant invested in the equity of various companies and the investment becomes the capital in nature, no matter whether the source of investment is out of capital receipt or revenue receipt. The appellant also argued that the expenses by way of a loss incurred for the extension of the business. No material is available in this regard and even otherwise any expenditure in connection with the extension of the existing business is of capital nature. One of the conditions for the deduction u/s 37 of the Act is that the expenditure should not be in the nature of capital expenditure. Therefore, the appellant is not eligible for deduction u/s 37 of the Act. The appellant relied on certain judicial decisions which are distinguishable On-facts and not applicable to the issue under consideration. Therefore, the disallowance of the A.O is confirmed.”

10. We have heard the rival submissions. We shall first consider the grievance of the assessee as projected in the additional ground of appeal filed before the Tribunal. The sum and substance of the additional ground is that even if the advances written off is considered as not an allowable deduction in computing income from business, then the disallowance made by the AO will go to increase the profits of business of the Assessee. It is the plea of the Assessee that its income from business is eligible for deduction u/s.80IB of the Act and therefore to the extent of disallowance made by the AO the profits of the eligible business will get enhanced and on such enhanced profits the Assessee should be allowed deduction u/s.80IB of the Act and consequently the disallowance will have not tax implications vis-à-vis the Assessee. On this additional ground, reliance was placed by the assessee on CBDT Circular No.37/2016 dated 02.11.2016 wherein the CBDT has expressed the view that whenever a

disallowance of expenditure while computing the income from business is made, that will have an effect on the profits of the business getting enhanced. Wherever the assessee claims deduction under Chapter VIA on profits of business and if the disallowance of expenditure would go to increase the profits of business on which deduction under Chapter VIA of the Act is claimed by the assessee, then the disallowance will have no effect because the deduction under Chapter VIA has to be allowed on such enhanced profit. The view expressed in the CBDT Circular is based on the decision rendered by several High Courts and these have been set out in the Circular which is reproduced as follows:-

“2. The issue of the claim of higher deduction on the enhanced profits has been a contentious one. However, the courts have generally held that if the expenditure disallowed is related to the business activity against which the Chapter VI-A deduction has been claimed, the deduction needs to be allowed on the enhanced profits. Some illustrative cases upholding this view are as follows:

(i) If an expenditure incurred by assessee for the purpose of developing a housing project was not allowable on account of non-deduction of TDS under law, such disallowance would ultimately increase assessee's profits from business of developing housing project. The ultimate profits of assessee after adjusting disallowance under section 40(a)(ia) of the Act would qualify for deduction under section 80-IB of the Act. This view was taken by the courts in the following cases:

- Income-tax Officer -Ward 5(1) v. Keval Construction [2013] 33 taxmann.com 277 (Guj.)
- Commissioner of Income-tax-IV, Nagpur v. Sunil Vishwambharnath Tiwari [2016] 63 taxmann.com 241 (Bom.)

(ii) If deduction under section 40A(3) of the Act is not allowed, the same would have to be added to the profits of the undertaking on which the assessee would be entitled

for deduction under section 80-IB of the Act. This view was taken by the court in the following case:

- Principal CIT, Kanpur v. Surya Merchants Ltd. [2016] 72 taxmann.com 16 (All.).

The above views have attained finality as these judgments of the High Courts of Bombay, Gujarat and Allahabad have been accepted by the Department.

3. In view of the above, the Board has accepted the settled position that the disallowances made under sections 32, 40(a)(ia), 40A(3), 43B, etc. of the Act and other specific disallowances, related to the business activity against which the Chapter VI-A deduction has been claimed, result in enhancement of the profits of the eligible business, and that deduction under Chapter VI-A is admissible on the profits so enhanced by the disallowance.

4. Accordingly, henceforth, appeals may not be filed on this ground by officers of the Department and appeals already filed in Courts/Tribunals may be withdrawn/not pressed upon. The above may be brought to the notice of all concerned.”

11. The Id. counsel for the assessee therefore submitted that the assessee was entitled to claim deduction u/s. 80IB of the Act and disallowance made could increase the profits on which 80IB deduction was claimed by the assessee and following the CBDT Circular, the assessee should be allowed deduction on the enhanced profits.

12. The Id. DR submitted that the facts with regard to the disallowance going to enhance the profits on which the assessee would be entitled to deduction u/s. 80IB of the Act, consequent to the impugned disallowance, are not clear from the record and he relied on the order of CIT(Appeals).

13. After considering the rival submissions, we are of the view that *prima facie* the claim made by the assessee in the additional ground of appeal deserves to be accepted. However, it requires to be verified whether the impugned disallowance would go to enhance the profits on which the assessee had claimed deduction u/s. 80IB of the Act. We therefore set aside the order of CIT(Appeals) on this issue and restore the same to the file of AO to examine this aspect and if the claim made by the assessee is found to be correct, then assessee should be allowed deduction u/s. 80IB on the enhanced profit and consequently the disallowance made by the AO will have no effect. Therefore, the question whether the disallowance is justified or not is left open. We hold and direct accordingly.

14. As far as the second issue raised by the assessee is concerned, the same is with regard to the determination of book profits u/s. 115JB of the Act. Even with reference to this ground, the assessee has filed an application for admission of additional ground as follows:-

“The authorities below ought to have allowed a sum of Rs.14,50,66,593/- as bad debts in computing the regular income on the facts and circumstances of the case.”

15. As far as the issue of computation of book profits u/s. 115JB of the Act is concerned, the facts are that while computing book profits u/s. 115JB of the Act, the AO added to the profit as per the P&L account a sum of Rs.14,50,66,953, which was provision for bad and doubtful advances debited in the P&L account. In doing so, the AO relied on Explanation 1 clause (i) to section 115JB of the Act, which provides that book profits means net profit shown in the P&L account prepared in accordance with the provisions of section 115JB(2) of the Act; as increased by the amount or amounts set aside as provision for diminution in the value of any asset.

As a result, the tax payable by the assessee was determined by the AO in accordance with the provisions of section 115JB and not under the normal provisions of the Act. The CIT(Appeals) confirmed the order of AO. Hence the present appeal by the assessee before the Tribunal.

16. The Id. counsel for the assessee relied on the decision of Hon'ble High Court of Karnataka in the case of *CIT v. Kirloskar Systems Ltd., 220 Taxman 1 (Kar)* wherein on an identical issue, the Hon'ble High Court came to the conclusion that there need not be any addition to the profit as per the P&L account by invoking clause (i) or (c) of Explanation 1 to section 115JB of the act in a case where there is a corresponding reduction of the sum debited to the profit and loss account on account of provision for bad and doubtful debts from the Advances shown in the Balance Sheet of the Assessee. Such a presentation in the books of accounts is akin to write off of debts due as bad and doubtful, though the nomenclature used is "provision for bad and doubtful debts". In the present case, it has been the claim of assessee before the CIT(Appeals) that under the head 'administrative expenses', sum of Rs.14,50,66,593 which was provision for bad and doubtful advances was claimed as a deduction in the profit and loss account and that in the balance sheet, from the loans & advances, this provision has been deducted. It was the plea of the Assessee that by virtue of debit in the P&L account of provision for bad and doubtful advances and by reducing the same amount from the loans & advances as appearing in the balance sheet, there is in effect a write off of bad and doubtful advances and it cannot be said that there was only a provision on account of bad and doubtful advances debited in the P&L account, which has to be added to the profit as per P&L account while determining the book profits u/s. 115JB of the Act by invoking clause (i) or (c) to Explanation-1 to Sec.115JB of the Act. The assessee had in this regard relied on the decision of the Hon'ble Supreme Court in the case of *Vijaya*

*Bank v. CIT, 323 ITR 166 (SC)* for the proposition that by debiting in the P&L account of provision for bad and doubtful advances and by reducing the same amount from the loans & advances as appearing in the balance sheet, there is in effect a write off of bad and doubtful advances as bad debts.

17. The Hon'ble High Court of Karnataka on a similar objection in the case of *Kirloskar Systems Ltd. (supra)* took a view that addition of provision of bad and doubtful debts to the profit as per P&L account to determine the book profits u/s. 115JB of the Act is not warranted. The court held that provision for diminution in value of assets debited to profit and loss account is not required to be increased as per clause (i) of Explanation 1 to section 115JB to compute book profit under section 115JB when assessee has debited diminution in value of assets as a provision to profit and loss account and simultaneously reduced the said sum from the advances shown in the balance sheet. Similarly, provision for doubtful debts debited to profit and loss account is not required to be increased as per clause (c) of Explanation 1 to section 115JB to compute book profit under section 115JB.

18. In the light of aforesaid decision of the Hon'ble jurisdictional High Court, we are of the view that the provision for bad and doubtful advances debited in the P&L account and its simultaneous reduction in the loans & advances in the balance sheet will not only mean that there was an actual write off of bad and doubtful advances in the P&L account, but also that there was no deduction claimed on account of provision by the assessee. Consequently, the addition made by the AO in determining the book profits of the assessee is not warranted and the said addition directed to be deleted. Consequently, the second issue is decided in favour of assessee.

19. In the result, the appeal by the assessee is treated as partly allowed.

Pronounced in the open court on this 14<sup>th</sup> day of June, 2019.

Sd/-

(B.R. BASKARAN)  
Accountant Member

Sd/-

( N.V. VASUDEVAN)  
VICE PRESIDENT

Bangalore,  
Dated, the 14<sup>th</sup> June, 2019.

/ Desai Smurthy /

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,  
ITAT, Bangalore.